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Public Prosecutor v Hong Ho Aik

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HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT(3) 45–29 OF 2004
MOHD ZAWAWI SALLEH JC
25 JANUARY 2008

C

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Element of possession — Whether mere physical possession of drugs sufficient — Whether mens rea possession vital to establish element of possession in a charge of trafficking

D

Criminal Law — Dangerous Drugs Act 1952 — ss 12(2), 39A(2) — Possession of dangerous drugs — Small amount of drugs involved — Accused a first offender pleading guilty to offence — Assessment of sentence — Whether sentence should reflect quantity of drugs involved

E

Criminal Procedure — Charge — Amendment — Charge of drug trafficking preferred against accused — Element of possession only presumed — Whether presumption of possession could in turn ground a presumption of trafficking — Whether court ought to amend charge to one of drug possession instead — Criminal Procedure Code s 158(1)

F

Criminal Procedure — Sentence — Dangerous drugs — Possession of — Assessment of sentence — Accused a first offender pleading guilty to offence — Whether sentence should reflect quantity of drugs involved

G

Evidence — Presumption — Drug trafficking — Double presumptions — Presumption of possession invoked to ground element of possession in drug trafficking charge — Whether a subsequent presumption of trafficking could be invoked upon presumption of possession — Whether charge of drug possession ought to be amended to one of drug possession instead — Dangerous Drugs Act 1952 s 37(d) & (da)

H

Evidence — Witness — Failure of prosecution to call witness — Effect of — Whether serious gap caused in prosecution's case

I

The accused claimed trial to a charge of trafficking in dangerous drugs

contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The drugs consisted of 11.54g monoacetylmorphines and 10.78g heroin. The facts adduced by the prosecution revealed that acting on prior information received, the police set up an ambush for the accused. As the accused approached the ambush, the police drew up to him and the head of the raiding party — SP1 — identified himself. The accused fled but was arrested nearby. After his arrest, SP1 again identified himself to the accused and carried out a search on the accused. From the right trouser pocket of the accused, SP1 recovered two brown envelopes. Inside these envelopes, there were 12 transparent plastic packets respectively containing substances later confirmed by the chemist to be dangerous drugs. Counsel for the accused conceded that physical custody and/or control of the drugs were established but argued that mens rea possession had not been proven. Counsel also argued that there was a discrepancy as to the weight of the drugs. The defence also contended that the failure to call the storekeeper who registered the exhibits in the instant case, was fatal.

Held, amending the charge to one of possession and convicting the accused on his guilty plea thereto:

(1) It is the duty of the prosecution at the close of its case to prove a prima facie case against the accused as provided under s 180(1) of the Criminal Procedure Code ('CPC'). The steps that should be taken by a trial court at the close of the prosecution's case are set out in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 (see para 8).

(2) The drugs were found in the trouser pocket of the accused. The court was satisfied that the elements of physical custody and control had successfully been proven by the prosecution. The accused thus had physical possession over the drugs (see paras 12–13).

(3) The prosecution had to prove not just physical possession but mens rea possession; mens rea possession dependent upon the element of knowledge. In the instant case, the fact that the accused fled when SP1 identified himself as a police officer did not necessarily lead to a firm conclusion of a guilty mind. There was more than one inference that could be drawn by the court. Therefore, the inference most favorable to the accused should be adopted (see paras 17 & 19).

(4) On the facts, the prosecution had only proved that the accused had custody and control of the drugs in the packets found in the pocket of his trousers. No knowledge of the contents had been proved. Therefore,

in order to prove possession, the prosecution had to invoke s 37(d) of the Act. However, once the prosecution invoked s 37(d), the prosecution could not invoke s 37(da) because it would offend the rule of double presumptions (see para 26); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 followed.

(5) Counsel's submission on the weight discrepancy of the drugs had no merit. On the facts, the actual discrepancy of the gross weight of the substances was 2.82g. The evidence adduced by the prosecution showed that the substances produced in court were the substances found in the trouser pocket of the accused. The discrepancy in the gross weight of the drugs could be due to the different scales used by the police and chemist. There was no evidence that the exhibits were tampered with. There was no break in the chain of evidence concerning the exhibits (see para 28(1) & (2)).

(6) The decision whether to call or not a witness is always the right of the prosecution. The failure to call a witness is fatal only when it gives rise to a serious gap in the prosecution's case. Thus, the failure on the part of the prosecution to call the police storekeeper who registered the drugs, did not give rise to a serious gap in the prosecution's case (see paras 30–31).

(7) In the circumstances, a prima facie case of possession under s 12(2) of the Act and punishable under s 39A(2) of the Act had been established against the accused. Accordingly, the court, pursuant to s 158(1) of the CPC, would amend the charge (see para 32).

(8) In the instant case, the total weight of drugs was 22.32g which was a relatively small amount. The sentence imposed on the accused should reflect the weight or quality of the drugs. Since this was also the first offence committed by the accused, his guilty plea entitled him to some discount or credit. An appropriate and adequate sentence in the instant case would be nine years' imprisonment from the date of arrest and ten strokes of the cane (see paras 37–39); *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 401 followed.

[Bahasa Malaysia summary

Tertuduh menuntut dibicarakan terhadap pertuduhan pengedaran dadah berbahaya bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Dadah tersebut mengandungi 11.54g monoacetylmorphines dan 10.78g heroin. Fakta-fakta yang dikemukakan oleh pihak pendakwaan mendedahkan bahawa berdasarkan tindakan atas maklumat yang diterima, pihak polis bersedia membuat serang hendap ke atas tertuduh. Apabila tertuduh mendekati serang hendap itu, pihak polis

mendekatinya dan ketua pasukan serbuan — SP1 — memperkenalkan dirinya. Tertuduh melarikan diri tetapi telah ditangkap sejurus kemudian. Selepas tangkapannya, SP1 sekali lagi memperkenalkan dirinya kepada tertuduh dan menjalankan siasatan ke atas tertuduh. Daripada poket seluar sebelah kanan tertuduh, SP1 menemui dua sampul surat berwarna coklat. Di dalam sampul surat tersebut, terdapat 12 paket plastik lut sinar yang kemudiannya telah disahkan oleh ahli kimia sebagai dadah berbahaya. Peguam bagi pihak tertuduh mengaku bahawa penjagaan dan/atau kawalan fisikal dadah tersebut telah dibuktikan tetapi berhujah bahawa milikan mens rea tidak dibuktikan. Peguam juga berhujah bahawa terdapat percanggahan berhubung berat dadah tersebut. Pihak pembelaan juga berhujah bahawa kegagalan untuk memanggil penyelenggara stor yang mendaftar ekshibit-ekshibit dalam kes semasa, adalah memudaratkan.

Diputuskan, meminda pertuduhan kepada pemilikan dan mensabitkan tertuduh berdasarkan pengakuan bersalahnya:

(1) Ia adalah kewajipan pihak pendakwaan di penutup kesnya untuk membuktikan satu kes prima facie terhadap tertuduh sepertimana yang diperuntukkan di bawah s 180(1) Kanun Prosedur Jenayah ('KPJ'). Langkah-langkah yang patut diambil oleh mahkamah perbicaraan di penutup kes pendakwaan dinyatakan dalam *PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, *Balachandran v PP* [2005] 2 MLJ 301, *Looi Kow Chai v PP* [2003] 2 MLJ 65 dan *PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 (lihat perenggan 8).

(2) Dadah ditemui dalam poket seluar tertuduh. Mahkamah berpuas hati bahawa elemen-elemen penjagaan dan kawalan fisikal telah berjaya dibuktikan oleh pihak pendakwaan. Tertuduh oleh itu mempunyai milikan ke atas dadah tersebut (lihat perenggan 12–13).

(3) Pihak pendakwaan bukan sahaja perlu membuktikan milikan fisikal tetapi milikan mens rea; milikan mens rea bergantung kepada elemen pengetahuan. Dalam kes semasa, hakikat bahawa tertuduh melarikan diri apabila SP1 memperkenalkan dirinya sebagai pegawai polis tidak semestinya membawa kepada satu kesimpulan yang kukuh suatu minda yang bersalah. Terdapat lebih daripada satu inferens yang boleh disimpulkan oleh mahkamah. Oleh itu, inferens yang paling berpihak kepada tertuduh patut digunakan (lihat perenggan 17 & 19).

(4) Atas fakta, pihak pendakwaan telah hanya membuktikan bahawa tertuduh mempunyai penjagaan dan kawalan terhadap dadah di dalam paket-paket yang ditemui di dalam poket seluarnya. Tiada pengetahuan tentang kandungannya telah dibuktikan. Oleh itu, bagi tujuan membuktikan milikan, pihak pendakwaan perlu menggunakan s 37(d)

A Akta tersebut. Namun, apabila pihak pendakwaan menggunakan s 37(d), pihak pendakwaan tidak boleh menggunakan s 37(da) kerana ia melanggar peraturan anggapan berganda (lihat perenggan 26); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 diikut.

B (5) Hujah peguam tentang percanggahan berat dadah tersebut tidak bermerit. Berdasarkan fakta, percanggahan sebenar berat kasar bahan tersebut adalah 2.82g. Keterangan yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa bahan yang dikemukakan di mahkamah merupakan bahan yang ditemui di dalam poket seluar C tertuduh. Percanggahan dalam berat kasar dadah tersebut mungkin disebabkan oleh skala berbeza yang digunakan oleh pihak polis dan ahli kimia. Tiada keterangan bahawa ekshibit-ekshibit tersebut telah diusik. Tiada sebarang lompang dalam rangkaian keterangan berkaitan ekshibit-ekshibit tersebut (lihat perenggan 28(1) & (2)).

D (6) Keputusan sama ada untuk memanggil atau tidak seorang saksi adalah sentiasa hak pihak pendakwaan. Kegagalan untuk memanggil saksi adalah memudaratkan hanya jika terdapat jurang serius dalam kes pihak pendakwaan. Oleh itu, kegagalan di pihak pendakwaan untuk E memanggil polis penyelenggara stor yang mendaftar dadah tersebut, tidak menimbulkan jurang serius dalam kes pihak pendakwaan (lihat perenggan 30–31).

(7) Dalam keadaan ini, suatu kes prima facie pemilikan di bawah s 12(2) Akta tersebut dan boleh dihukum di bawah s 39A(2) Akta tersebut F telah dibuktikan terhadap tertuduh. Sewajarnya, mahkamah, menurut s 158(1) KPJ, akan meminda pertuduhan tersebut (lihat perenggan 32).

(8) Dalam kes ini, berat keseluruhan dadah tersebut adalah 22.32g yang merupakan jumlah kecil. Hukuman yang dikenakan ke atas tertuduh G sepatutnya menggambarkan berat dan kualiti dadah tersebut. Memandangkan ini juga merupakan kesalahan pertama yang dilakukan oleh tertuduh, pengakuan bersalahnya melayakkannya mendapat pengurangan atau kredit. Hukuman yang sesuai dan memadai dalam kes semasa adalah sembilan tahun penjara dari tarikh tangkapan dan H sepuluh kali sebatan rotan (lihat perenggan 37–39); *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 401 diikut.]

Notes

For a case on ss 12(2), 39A(2) of the Dangerous Drugs Act 1952, see 4 I *Mallal's Digest* (4th Ed, 2005 Reissue) para 180.

For cases on amendment of charge, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1060–1065.

For cases on dangerous drugs sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3564–3566.

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2735–2742.
For cases on presumption of drug trafficking, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2034–2041.
For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Balachandran v PP [2005] 2 MLJ 301 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489 (refd)
Looi Kow Chai v PP [2003] 2 MLJ 65 (refd)
Matru alias Girish v The State of UP AIR 1971 SC 1050; [1971] Cri LJ 913 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
PP v Abd Latif bin Sakimin [2005] 6 MLJ 351 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Kang Ho Soh [1992] 1 MLJ 360 (refd)
PP v Lee Hock Lai [2003] MLJU 579 (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Nik Ahmad Aman bin Nik Mansor [2002] 2 MLJ 641 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
PP v Tan Tatt Eek [2005] 4 CLJ 460 (refd)
PP v Tan Tatt Eek [2005] 6 AMR 543 (folld)
PP v Tia Ah Leng [2000] 5 MLJ 401 (folld)
Pendakwa Raya lwn Teh Eng Wah [1999] MLJU 120 (refd)
Reza Mohd Shah bin Ahmad Shah v PP [2006] 2 MLJ 223 (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158 (refd)
Sanusi bin Ismail v PP [2004] 6 AMR 256 (refd)
Surentheren Selvaraia v PP [2005] 2 CLJ 264 (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105 (refd)
Tan Lay Chen v PP [2001] 1 MLJ 135 (refd)
Toh Ah Loh & Anor v Rex [1949] MLJ 54 (refd)
Toh Su Kuan v PP [2005] 3 CLJ 740 (folld)
Yeong Kia Heng lwn Pendakwa Raya [1992] 1 MLJ 327 (refd)

Legislation referred to

Criminal Procedure Code ss 158(1), 180(1)
Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da), 39A(2), 39B(1)(a), 39B(2)

A

Idham bin Abdul Ghani (Deputy Public Prosecutor) (Johor State Legal Advisor Office) for the prosecution.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the accused.

B **Mohd Zawawi Salleh JC:**

BACKGROUND

[1] Hong Ho Aik ('the accused') was charged for trafficking in 11.54g C monoacetylmorphines and 10.78g heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') and punishable under s 39B(2) of the same Act.

[2] The accused claimed trial to the charge.

D

[3] The prosecution called five witnesses to support its case. They are ASP Charun Aai Been ('SP1'), D/Sjn Abd Razak bin Othman ('SP2'), C/Insp Annan bin Ibrahim ('SP3'), Sjn Anwar bin Md Din ('SP4') and Abdullah bin Mohd Yusof ('SP5').

E

[4] At the end of the prosecution's case, the court has amended the original charge from s 39B(1)(a) of the Act to s 12(2) of the Act and punishable under s 39A(2) of the Act. The accused pleaded guilty to the amended charge and F was sentenced to nine years imprisonment from the date of arrest (5 November 2003) and ten strokes.

[5] The prosecution now files an appeal against the whole of the said decision.

G

THE CHARGE

[6] The charge against the accused was as follows:

H Bahawa kamu pada 5 November 2003, jam lebih kurang 1 tengah hari, di Jalan Tombak 5, Taman Sri Tebrau, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Takzim, telah memperedarkan dadah berhahaya iaitu sejumlah 22.32g (11.54g monoacetylmorphines dan 10.78g heroin) dan dengan itu kamu telah melakukan kesalahan di bawah s 39B(l)(a) Akta Dadah Berhahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

I

THE PROSECUTION'S CASE

[7] The salient facts adduced by the prosecution can be summarised as follows:

(1) Acting on the information received, SP1 (ASP Charun Aai Been) had on 5 November 2003 at about 12 noon led a party of nine other police personnel to the scene of the crime, that is, at Jalan Tombak 5, Taman Seri Tebrau, Johor Bahru. SP1 had divided his men into three groups. Upon arrival, SP1 together with the other two police personnel who constituted Group 1 took up position at Jalan Tombak 3, which had been marked as 'Z' in the sketch plan ('P12'). Groups 2 and 3, on the other hand, took up position at 'Y' as shown in P12, which was along Jalan Tombak 5.

(2) In his evidence, SP1 testified that while he was waiting, at about 1pm, he saw a male Chinese (accused) walking from a lane from Jalan Tombak 3 and going into Jalan Tombak 5. After confirming that the man was the target, SP1 gave instructions to his men to arrest the accused.

(3) SP1 then drove his car towards the accused. He and his men came out from the car. He identified himself as a police officer to the accused. The accused then fled but was arrested by SP2 (D/Sjn Abd Razab) and D/Kpl Rajuddin at the sport marked as 'X' in exh P12 which was a lane between Jalan Tombak 5 and Jalan Keris 1.

(4) After the accused was arrested, once again, SP1 identified himself as a police officer to the accused. He did a body search on the accused and from the right trouser pocket, SP1 recovered two brown envelopes, (exh P8 and exh P9). Inside exh P8 and exh P9 there were 12 transparent plastic packets [exh P10 (1–6) and exh P11 (1–6)] respectively containing substances suspected to be heroin.

(5) SP1 testified that before he handed over the offending exhibits seized from the accused to the investigating officer (SP3), he marked the exhibits with his signature and also the date of arrest. The exhibits were under his control and supervision until they were handed over to SP3 together with the accused on 6 November 2003, at about 1am.

(6) SP3 in his evidence said that the exhibits were kept in his locked steel cabinet in his office to which only he had the key. SP3 then handed over the exhibits to the chemist (SP5) on 8 November 2003.

(7) These substances were later positively confirmed by the chemist to contain 11.54g of monoacetylmorphines and 10.78g of heroin, the subject matter of the charge.

A BURDEN ON THE PROSECUTION

[8] It is the duty of the prosecution at the close of its case to prove a prima facie case against the accused as provided under s 180(1) of the Criminal Procedure Code. The steps that should be taken by trial court at the close of the prosecution's case had been set out in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1.

C EVALUATION OF EVIDENCE BY THE COURT

[9] Based on the evidence of the case, there are three issues to be determined, namely:

D

(a) whether the accused had custody and/or control over the drugs;

(b) whether the elements of mens rea possession had been proven; and

(c) whether there is a doubt as to the identity of the drugs in question.

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[10] These issues are now separately discussed.

Whether the accused had custody and/or control over the drugs

F

[11] SP1 testified that when he did a body search on the accused, he found two brown envelopes (exh P8 and exh P9) from the right trouser pocket. In each of the envelopes, there were six transparent plastic packets containing substances suspected to be heroin. SP1 evidence on this aspect was supported G by SP2, one of the raiding teams.

[12] Tuan Hj Hisyam Teh Poh Teik, the learned defence counsel, in his submission admitted that the elements of physical custody and/or control had been proven as the drugs were found in the pocket of the accused.

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[13] The court was satisfied that the elements of physical custody and control had successfully been proven by the prosecution and accordingly found that the accused had physical possession over the drugs.

I

Whether the elements of mens rea possession had been proven

[14] The learned defence counsel argued that the mens rea possession had not been proven. Therefore, there is no actual possession of the drugs.

[15] However, the learned deputy public prosecutor, Encik Idham bin Hj Abd Ghani, submitted that the prosecution had proved the elements of possession as required by the law. The learned deputy public prosecutor stressed that the accused, upon being confronted by SP1 before his arrest had attempted to escape. This indicates his guilt to the offence charged. The fact that both of the envelopes (exh P8 and exh P9) were cello taped, the inference can be made that the accused can see the contents of the envelopes without much difficulty.

[16] After the evaluation of the evidence adduced by the prosecution, it was crystal clear that the accused had physical possession of the 12 packets of drugs. However, that was not the end of the matter. The next important question to be considered is whether the accused had requisite knowledge.

[17] It is elementary that the prosecution had to prove not only physical possession but also the mens rea possession. The authorities on this point are legion. In *Toh Ah Loh & Anor v Rex* [1949] MLJ 54, Gordon Smith, Acting CJ defined possession as follows:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, and must have in him a power of disposal over the thing, and lastly conscious of his possession of the thing.

[18] In *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158, Yong J stressed the necessity of establishing the ingredient of knowledge on the part of an accused before he could be incriminated with possession. His Lordship there said:

> In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statue, which is not applicable in this case.

(See also *Public Prosecutor v Abd Latif bin Sakimin* [2005] 6 MLJ 351 and *Public Prosecutor v Kang Ho Soh* [1992] 1 MLJ 360.

[19] The fact that the accused fled when SP1 identified himself as a police officer does not necessarily lead to a firm conclusion of guilty mind. Although SPl had identified himself as a police officer to the accused, when he drove his car towards the accused and came out from the car with his men, it might create a panic situation for the accused. There is more than one inference

could be drawn by this court. Therefore, the inference that most favorable to the accused should be adopted (see *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105).

[20] The Indian Supreme court in *Matru alias Girish v The State of UP* AIR 1971 SC 1050; [1971] Cri LJ 913, had stated:

> Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime: such as the instinct of self-preservation. The act of absconding is no doubt a relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused.

(See also *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; *Public Prosecutor v Tan Tatt Eek* [2005] 6 AMR 543; *Public Prosecutor v Nik Ahmad Aman bin Nik Mansor* [2002] 2 MLJ 641; *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 and *Pendakwa Raya lwn Teh Eng Wah* [1999] MLJU 120).

[21] There was no evidence adduced by the prosecution that in anytime the accused did open the envelopes or it was the accused who put the drugs inside the envelopes. The court had to bear in mind that the drugs in question were heroin and monoacetylmorphines. SP1 during the cross examination agreed with defence counsel's suggestion that for one who is unfamiliar with heroin and monoacetylmorphines, one would not know that the contents of exhs P20 and P21 are heroin and monoacetylmorphines even one as physical custody of it. During cross-examination SP1said:

> Saya setuju bahawa bagi seorang yang tidak biasa dengan heroin dan MAM, walaupun heroin dan MAM itu dipegang, dia tidak tahu itu adalah dadah heroin/MAM.

The evidence of SP1 was supported by SP5. During cross-examination, SP5 said:

> Bagi seorang yang tidak biasa dengan heroin atau monoacetylmorphines, walaupun dia pegang, dia tidak tahu dadah itu heroin atau monoacetylmorphines.

[22] In considering the issue of knowledge, the court is guided by the legal standard articulated by the superior courts, inter alia, in the case of *Toh Su*

Kuan v Public Prosecutor [2005] 3 CLJ 740; *Reza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223 and *Public Prosecutor v Tan Tatt Eek* [2005] 6 AMR 543. The legal standard articulated in these cases, notwithstanding the inevitable existence of factual distinctions between different cases, had become 'embedded in the warp and woof of our law' and this court therefore is not free to depart from them.

[23] The facts in the case of *Toh Su Kuan v Public Prosecutor* 2005] 3 CLJ 740 were stronger against the accused compared to the present case. In that case, the evidence by the prosecution was that the drug was found in 356 packets in different parts of the accused person. 62 packets in the left shoe, 60 packets in the right shoe, 57 packets strapped to the left shin, another 57 packets strapped to the right shin, 60 packets tied to the waist in front and 60 packets fastened to the waist at the back. Gopal Sri Ram JCA delivering the judgment of the court said:

> In our judgment, the matter in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substances, perhaps drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew that the packets contained heroin, the drug which form the subject matter of the charge. It follows from what we have said this far that from the totality of evidence led by the prosecution that the vital ingredient of mens rea possession required by s 37(da)(i) had not been established. On the ground alone the learned judge ought not to have called the appellant to enter upon his defence. And this is a case where the learned deputy took the position that this was either a case of actual trafficking or no offence.

[24] In the case of *Reza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223, the facts showed the appellant was carrying a plastic bag for some distance and upon being confronted by the police the appellant ran and was seen throwing the plastic bag. The plastic bag was later found to contain cannabis, the subject matter of the charge. On the need to prove knowledge of the nature of the drugs, Abdul Kadir Sulaiman JCA (as he then was) concluded (at pp 229–230):

> The learned judge in his judgment at p 22 of the appeal record said that in the nature of the charge, it is not necessary for the prosecution to prove that the appellant had knowledge of the nature of the drug. With respect, we cannot agree with such conclusion. By the operation of our Dangerous Drugs Act 1952, in relation to the charge, it is necessary for the prosecution to prove directly or inferentially that the appellant had the knowledge of the nature of the dangerous drug he was carrying in the plastic bag. Knowledge in a person is a thing which cannot be seen or perceived. It can be deduced only from the overt act or conduct short of his own admission. The legislature in its wisdom, realising the difficulty of establishing by direct evidence of this fact of knowledge, introduced a statutory

presumption which is rebuttable, by way of s 37(d) of the Act. In *Taib bin Mohamad v Public Prosecutor* [2002] 3 MLJ 476, this court said at p 480:

> We have examined the evidence adduced in the case at the prosecution stage of the trial to see if the facts disclosed that the accused had actual knowledge of the nature of the drugs so that the judge could have relied on such facts to infer knowledge without resorting to s 37(d) of the Act in which case the invoking of the presumption of trafficking under s 37(da) of the Act would have been correct in law. We did not find sufficient evidence for the judge to infer that the accused had knowledge that the material was cannabis ... the mere throwing of the bag without more cannot constitute knowledge of the contents of the bag ...
>
> There being no evidence from which his knowledge of the drugs could be inferred, the learned judge could not and should not have called the accused to make his defence on the charge of trafficking but the accused because of the presumption of knowledge of the drug raised under s 37(d) of the Act, could be called upon his defence on a charge of possession of the cannabis.

Therefore, upon the conduct of the appellant, only the statutory presumption is s 37(d), can assist the prosecution to deem the appellant to have been in possession of such drug, cannabis, and to have known that exh P3 contained cannabis, the subject matter of the charge. However, the learned judge and the prosecution did not avail themselves of the provisions of s 37(d) thereof. So, on the facts, we disagreed with the learned judge that in the present case involving the appellant, he could be inferred to have the knowledge that what he possessed was the dangerous drug, cannabis. Short of invoking the statutory presumption provided by s 37(d) upon the conduct of the appellant, no prima facie case had been made out against the appellant that he was in possession of cannabis with the requisite knowledge.

[25] In order to prove knowledge of the nature of the drugs, Nik Hashim FCJ in the case of *Public Prosecutor v Tan Tatt Eek* [2005] 4 CLJ 460, speaking for the Federal Court said:

> In our view, the Court of Appeal was right in holding that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of the nature of the drugs in the bag. On the evidence, the learned trial judge erred in finding that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case.
>
> In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted in shock when he was arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.
>
> The factum of the respondent having dropped the bag and displayed the reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on part of the respondent over the presence of the drugs in the bag. But such

conduct is equally consistent with an innocent man who is in a state of pure panic reacts in that way (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). On the conduct of the respondent, the learned trial judge at p 133 of the appeal record jilid II had this to say:

> The accused was clearly caught by surprise. To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could equally be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evidence.

So, how much support do the facts of dropping and being in a state of shock lend the appellant in this submission that the court should infer from them the fact that the respondent had knowledge of the drugs? In *Tai Chai Keh v Public Prosecutor* [1948-1949] MLJ Supp 105 at p 108 Spenser Wilkinson J said:

> … where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of option that the inference most favourable to the accused should be adopted.

Thus, it is clear from the above said passage that what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts which leave no other possible alternative inference which can reasonably be drawn. In the absence of such evidence, the court cannot but hold that there are other inferences possible in the circumstances. Hence, the facts of 'dropping and being in a state of shock' without more cannot constitute knowledge of the contents of the bag. There is simply insufficient evidence to support the inference of knowledge in the present case.

Furthermore, the evidence was that the drugs were in the newspaper wrapped packages, and surely, one would not be able to see through the newspaper wrapping. One wonders how the manner of packaging in this case would in the ordinary course of conduct mean that the carrier knows of the contents of the bag. It is rather unfortunate that the learned trial judge indulged in conjecture and speculation to make inferences of knowledge in this case.

(See also *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; *Reza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223 and *Sanusi bin Ismail v PP* [2004] 6 AMR 256).

[26] Now, reverting back to the present case, the prosecution had only proved that the accused had only custody and control of the drugs in the packets found in the pocket of his trousers. No knowledge of the contents had been proved. Therefore, in order to prove possession, the prosecution has to invoke s 37(d) of the Act. But, once the prosecution invoked s 37(d), the prosecution cannot invoke s 37(da) because it would offend the rule of double presumptions (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273).

Whether there is a doubt as to the identity of the drugs in question

[27] Learned defence counsel argued that there was a discrepancy as to the weight of the drugs. According to the investigating officer (SP3), the gross weight of exh P10 (1–6) is 18g per packet whilst the weight of exh P11 (1–6) is also 18g per packet except for exh P11(3) which is 17g. Altogether this will make the total gross weight to be 215g. However, the chemist (SP5) on the other hand says that the gross weight is 212.21g thus making a difference of about 2.79g. The cases of *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327 and *Public Prosecutor v Lee Hock Lai* [2003] MLJU 579 were referred to this court as authorities to show that this discrepancy was very fatal to the prosecution's case.

[28] With respect, the submission has no merit on the following reasons:

(1) The court has made its own calculation and found out that the actual discrepancy of the gross weight of the substances is 2.82g.

(2) This court was unable to agree with the argument by the defence counsel. The evidences given by SP1, SP3, SP4 and SP5 showed that the substances produced in this court were the substances that were found in the trouser pocket of the accused. The discrepancy in the gross weight of the drugs might be because the different scale used by SP3 and SP5. There was no evidence that the exhibits had been tampered. Therefore, there was no break in the chain of evidence as to the exhibits.

(3) SP1 gave evidence that before he handed over the exhs to SP3, he marked the two brown envelopes (exh P8 and exh P9) with his signatures and also the date of arrest. The same thing was done to all the twelve packets in the envelopes. He kept the exhibits in a lock steel cabinet which nobody else had access on it. The exhibits were then handed over to SP3 on 6 November 2003 at 1am together with a search list form (exh P15).

(4) SP3 testified that he received exh P8 and exh P9 from SP1 and marked them as 'A' and 'B'. Then, the six packets inside 'A' were marked as 'A1–A6' together with his signatures and the date he received them. The gross weight for each packet is 18g. The same thing was done to the six packets inside 'B' where the packets were marked as 'B1–B6'. The gross weight for each packet is 18g except for 'B3' where the gross weight is 17g. He instructed the police photographer to take pictures of the exhibits at his office (ID 6A–F). The photographs of the packets seized clearly show SP1's and SP3's signature and also the dates. The exhibits were then kept in his locked steel cabinet to which only he had the key. On 8 November 2003, he took out the exhibits, put in one envelope ('AR') and sealed it, then send the envelope to the Chemist

Department at 11.37am and was received by the chemist (SP5). He received the exhibits from the chemist at 22 February 2004 at 3.10pm and put them back in his locked steel cabinet. On 24 February, the exhibits were registered with L/Kpl Jagit Singh, the storekeeper.

(5) SP4 gave evidence that when he took over the duties from L/Kpl Jagit Singh on 2 July 2007, all the keys, registration books and all exhibits that were registered by L/Kpl Jagit Singh were handed over to him. The exhibits in the present case are still in good condition when he received them.

(6) SP5 in his evidence said that he received one envelope (exh P7) from SP3. Inside this envelope, there were two envelopes marked as 'A' and 'B'. He weighed the substance in the packets and found that the net weight for the substance in 'A' was 100.90g and the net weight for the substance in 'B' was 100.69g. After analysis, SP5 placed the substance into a separate plastic packets marked as 'A' and 'B' with the laboratory reference number. Then, he put all the exhibits including the envelopes and the plastic packets to the original envelope (exh P7) and sealed the envelope with the seal of 'Jabatan Kimia Malaysia'. The exhibits were kept in a steel cabinet which only he had the access. On 20 February 2004, at 3.10pm, he handed over the exhibits to SP3 together with the chemist report (exh P18).

[29] On this particular issue, this court respectfully adopted the observation made by Abdul Hamid Mohamad JCA in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489, where he stated as follows (at p 508):

> First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is the same substance that is found to be heroin or cannabis etc and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.
>
> The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap' does not necessarily mean that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing

A that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

On the argument about the discrepancy in the weight of the drug, His Lordship stated:

B

Actually, the weight of 880g stated in the charge before the magistrate's court is the gross weight of the suspected drug contained in the plastic packets as weighed by the police. The exhibits had not been analysed by the chemist yet. We cannot expect the initial weighing by the police to be as accurate as that done by the C chemist. Regarding the alleged total 1211.3g, while writing this judgment, I did my own calculation and I found it to be 779.08g, not 1211.3g as alleged by the learned counsel. Regarding the total of 779g, that is correct. The difference of 0.08g is too small to cast any doubt on the evidence of weigh of the yellow granular and powdery substance. In any event, that is not the weight for which the D appellants were charged. They were charged with trafficking of 61.1g monoacetylmorphines. That is the weight given by the chemist. So, this ground has no merits.

Whether the failure on the prosecution to call L/Kpl Jagit Singh, the person who E *registered the exhibits, was fatal to its case*

[30] The decision whether to call or not a witness is always the right of the prosecution. The failure to call is fatal only when it gives rise to a serious gap in the prosecution's case (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 F MLJ 16).

[31] In the present case, L/Kpl Jagit Singh was the storekeeper of the exhibits. SP4 in his evidence testified that when he took over his duties as the storekeeper, he was given all the keys, the registration books and also the G exhibits. SP4 also affirmed that the exhibits in the present case were in a good condition and sealed with a safety seal. Therefore, the failure on the part of the prosecution to call this witness did not give rise to a serious gap in the prosecution's case.

H

[32] Based on the above reasons, this court found that a prima facie case of an offence of possession of the drugs under s 12(2) of the Act and punishable under s 39A(2) of the Act had been established against the accused. Accordingly, this court, as provided under s 158(1) of the CPC, has amended the charge as follows:

I

Bahawa kamu pada 5 November 2003, jam lebih kurang 1 petang, di Jalan Tombak 5, Taman Sri Tebrau, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Takzim, telah didapati dalam jagaan dan milikan kamu dadah berbahaya iaitu 22.32g (11.54g Monoacetylmorphines dan 10.78g heroin) yang mana kamu

tidak diberi kuasa yang sah menurut undang-undang untuk mempunyai jagaan atau kawalan dadah tersebut dan dengan itu kamu telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39A(2) Akta yang sama.

[33] The amended charge was read and explained to the accused and he pleaded guilty to the charge. This court then found the accused guilty on the amended charge.

[34] Learned counsel advanced a persuasive plea as follows:

(a) The accused pleaded guilty to the amended charge and is entitled to be given some discount or credit;

(b) The accused was only 26 years old at the time of his arrest;

(c) The accused worked in a pub with RM1,500 income per month;

(d) The accused studied only until Form 1;

(e) The accused is the youngest in the family. His father already passed away and his mother is 64 years old;

(f) The accused had repented and asked for another chance;

(g) The accused was arrested on 5 November 2003;

(h) Being a first offender; and

(i) Two representations were made to the Attorney General's chambers and if the charge was reduced earlier, the accused will plead guilty at the first opportunity given to him.

[35] The learned deputy public prosecutor however urged this court to impose deterrent sentence against the accused based on several factors:

(a) Public interest should be given priority compared to the mitigation factors that was based on individual interest;

(b) The long term of imprisonment would deter the public from committing the same offence; and

(c) The rampancy of the drug offences in Malaysia.

[36] Section 39A(2) of the Act provides that the punishment prescribed on conviction is not less than five years imprisonment and the maximum is life imprisonment together with a mandatory whipping of ten strokes.

[37] In the present case, the weight of drugs which were in the possession of the accused are 22.32g (11.54g monoacetylmorphines and 10.78g heroin).

Therefore, in this court opinion, the weight of the drugs which are the subject matter of the charge is relatively small in amount. The sentence imposed on the accused should reflect the weight or quality of the drugs. In *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 401, Augustine Paul J (as he then was) stated:

> ... In my opinion the learned magistrate's view that drug offences require a deterrent sentence is too wide and broad statement. The appropriate sentence for each drug offence depends on its own peculiar circumstances. In particular the weight of the drug found on the person plays a significant role in assessing sentence. In *Oloofen v Public Prosecutor* [1964] MLJ 305, Wee Chong Jin CJ emphasised the consideration to be given to the quantity of drugs involved in drug offences in assessing sentence. The same guidelines apply even to more serious drug offences. In *Public Prosecutor v Ang Soon Huat* (*Mallal's Digest* (4th Ed, 1994 Reissue) Vol 5 No 2378) it was held that in drug trafficking cases the sentence should be proportionate to the gravity of the offence, which is the quantity of the drugs that was being trafficked. This is also manifested by the fact that the Dangerous Drugs Act 1952 itself prescribes different penalties for drug offences depending on the weight of drugs involved.

(See also *Surentheren Selvaraia v Public Prosecutor* [2005] 2 CLJ 264 at p 271).

[38] The facts that this was the first offence committed by the accused and he had pleaded guilty entitled him to some discount or credit (see *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74; *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45 and *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167). Augustine Paul J (as he then was) in the case of *Tan Lay Chen v Public Prosecutor* [2001] 1 MLJ 135 said (at pp 140–141):

> [I]t must not be overlooked that the general rule is that an accused should be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentences. This is because an accused person expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty-plea cannot, on the facts of the case, be considered as a mitigating factor ...

[39] In assessing the sentence, this court has considered the principles of sentencing and mitigation plea advanced by defence counsel and the submission by the learned deputy public prosecutor. The sentence imposed

did not manifestly inadequate. But, it was appropriate and fair under the circumstances of the case. The sentence imposed was in accordance with the law.

Charge amended to one of possession. Accused convicted.

Reported by Andrew Christopher Simon